

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PARTNERWEEKLY, LLC,  
Plaintiff,

v.

VIABLE MARKETING CORP. and  
CHAD ELIE,  
Defendants.

2:09-CV-02120-PMP-VCF

ORDER

Presently before the Court is Plaintiff PartnerWeekly, LLC's Motion to Dismiss Counterclaims (Doc. #78), filed on August 20, 2013. Defendant Chad Elie filed an Opposition (Doc. #83) on October 2, 2013. Plaintiff filed a Reply (Doc. #86) on October 11, 2013.

**I. BACKGROUND**

Plaintiff PartnerWeekly, LLC ("PartnerWeekly") and Defendant Viable Marketing Group ("Viable") entered into an Advertising Agreement pursuant to which Viable agreed to pay PartnerWeekly for Internet advertising services. (Notice of Removal (Doc. #1), Ex. A, Attach. 1.) In August and September 2009, PartnerWeekly sent Viable notices of an outstanding balance for advertising services PartnerWeekly provided for which Viable had not paid. (Notice of Removal, Ex. A, Attachs. 2, 3.)

On October 7, 2009, PartnerWeekly brought suit in Nevada state court against Viable and its officer, Defendant Chad Elie ("Elie"), for breach of contract and other related

1 claims arising out of the unpaid advertising invoices. (Notice of Removal, Ex. A.)  
2 Defendant Viable removed the action to this Court. (Notice of Removal.) The Court  
3 ordered the parties submit to arbitration based on an arbitration clause in the Advertising  
4 Agreement. (Mins. of Proceedings (Doc. #19).)

5 The arbitrator issued a final decision granting judgment in favor of  
6 PartnerWeekly and against Viable. (Mot. to Vacate, Ex. 6.) PartnerWeekly thereafter  
7 moved to confirm the award in this Court, and Defendants Viable and Elie moved to vacate  
8 the award. (Mot. to Confirm Award (Doc. #34); Motion to Vacate Arbitration Award (Doc.  
9 #38).) The Court granted PartnerWeekly's Motion, denied Defendants' Motion, and  
10 confirmed the arbitration award in favor of PartnerWeekly and against both Viable and Elie.  
11 (Order (Doc. #42).) Elie thereafter moved to amend the judgment, arguing that the  
12 arbitrator entered an award against Viable, but not against Elie. (Defs.' R. 60(a) Mot. to  
13 Correct Mistake, Oversight, or Omission (Doc. #49); Defs.' R. 60(a) Mot. to Correct  
14 Mistake, Oversight, or Omission (Doc. #57).) The Court agreed with Elie that the arbitrator  
15 entered an award against Viable only. (Order (Doc. #60).) The Court therefore amended  
16 the prior Order confirming the arbitration award to reflect that the award was entered  
17 against Viable only. (Id.) The Court ordered Elie to answer or otherwise respond to the  
18 Complaint in this action. (Id.)

19 Elie thereafter moved to dismiss the Complaint, arguing there was no contract  
20 between PartnerWeekly and Elie, and there was no basis to find Elie was Viable's alter ego.  
21 (Def. Chad Edward Elie's Mot. to Dismiss (Doc. #71).) Elie further argued that  
22 PartnerWeekly should have pursued its claims against him in the arbitration, but it failed to  
23 do so, and it therefore was precluded from pursuing its claims under issue and claim  
24 preclusion principles. (Id.)

25 PartnerWeekly responded that it pled sufficient facts to support its allegations  
26 that Elie was Viable's alter ego, and that Elie therefore was liable on PartnerWeekly's

1 claims against Viable. (Pl.'s Opp'n to Mot. to Dismiss (Doc. #72).) PartnerWeekly further  
2 argued that claim and issue preclusion did not apply because this action is the only action  
3 PartnerWeekly has pursued against Elie, and PartnerWeekly could not pursue its claims  
4 against Elie in arbitration because Elie was not a party to the contract containing the  
5 arbitration clause. (Id.)

6 The Court denied Elie's Motion to Dismiss. (Order (Doc. #73).) Elie thereafter  
7 filed an Answer and Counterclaim (Doc. #75). Elie asserts three counterclaims based on  
8 the same Advertising Agreement and an Exclusivity Agreement. (Ans. & Countercl. at 7-  
9 8.) Elie asserts counterclaims for breach of contract, breach of the covenant of good faith  
10 and fair dealing, and fraud. (Id. at 8-12.)

11 PartnerWeekly now moves to dismiss Elie's counterclaims, arguing the  
12 Counterclaims are not adequately pled because the counterclaims are asserted against  
13 parties who are not plaintiffs in this case, Elie appears in his personal capacity as well as in  
14 his capacity as an officer of Viable Marketing even though Viable already lost in the  
15 arbitration, and the Counterclaims do not specify which claims are against PartnerWeekly.  
16 Additionally, PartnerWeekly contends the Counterclaims use the terms "counterclaimant"  
17 and "counterclaimants" interchangeably, such that PartnerWeekly cannot tell which claims  
18 are asserted by Elie personally and which are asserted by Elie on behalf of Viable.  
19 PartnerWeekly further argues that because Elie is not a party to the agreements, he has no  
20 standing to assert counterclaims based on the agreements. PartnerWeekly also contends  
21 Elie fails to plead fraud with the requisite particularity.

22 Elie responds that PartnerWeekly previously argued the arbitration does not  
23 preclude litigation of the dispute between Elie and PartnerWeekly, and thus PartnerWeekly  
24 cannot now argue that claim and issue preclusion apply to bar Elie's counterclaims. Elie  
25 contends that if he is Viable's alter ego as PartnerWeekly alleges, then he is entitled to  
26 pursue contractual remedies. As to his fraud claim, Elie contends he adequately has alleged

1 that PartnerWeekly intentionally provided false leads.

## 2 **II. DISCUSSION**

3 In considering a motion to dismiss, “all well-pleaded allegations of material fact  
4 are taken as true and construed in a light most favorable to the non-moving party.” Wyer  
5 Summit P’ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998). However,  
6 the Court does not necessarily assume the truth of legal conclusions merely because they are  
7 cast in the form of factual allegations in the plaintiff’s complaint. See Clegg v. Cult  
8 Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a strong presumption  
9 against dismissing an action for failure to state a claim. Ileto v. Glock Inc., 349 F.3d 1191,  
10 1200 (9th Cir. 2003). A plaintiff must make sufficient factual allegations to establish a  
11 plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550 U.S. 544, 556 (2007).  
12 Such allegations must amount to “more than labels and conclusions, [or] a formulaic  
13 recitation of the elements of a cause of action.” Id. at 555.

### 14 **A. Contract Claims**

15 Elie brings breach of contract and breach of the covenant of good faith and fair  
16 dealing counterclaims against PartnerWeekly. However, Elie is not a party to either the  
17 Advertising Agreement or the Exclusivity Agreement, nor does he allege he was an  
18 intended third party beneficiary of either agreement. (Pl.’s Mot. to Dismiss (Doc. #78, Ex.  
19 1 at 1, Ex. 2 at 1.)<sup>1</sup> His claims therefore fail as a matter of law. See Ins. Co. Of the West v.  
20 Gibson Tile Co., 134 P.3d 698, 702 (Nev. 2006) (en banc) (stating every contract in Nevada  
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22 <sup>1</sup> The Court may consider extrinsic documents beyond the Counterclaim without converting  
23 a motion to dismiss into one for summary judgment when “the plaintiff’s claim depends on the  
24 contents of a document, the [counter]defendant attaches the document to its motion to dismiss, and the  
25 parties do not dispute the authenticity of the document, even though the [counterclaimant] does not  
26 explicitly allege the contents of that document in the [counterclaim].” Knievel v. ESPN, 393 F.3d  
1068, 1076 (9th Cir. 2005). Elie asserts counterclaims based on the Advertising Agreement and  
Exclusivity Agreement, PartnerWeekly attached the two Agreements to its Motion, and Elie does not  
dispute the authenticity of those documents.

1 implies a covenant of good faith and fair dealing); Wyatt v. Bowers, 747 P.2d 881, 882-83  
 2 (Nev. 1987) (holding individuals who were not parties to or recipients of a particular  
 3 promise cannot sue to enforce breach of that covenant); Olson v. Iacometti, 533 P.2d 1360,  
 4 1364 (Nev. 1975) (stating a plaintiff cannot pursue a breach of contract claim if he is not a  
 5 party to the contract, unless he is an intended third party beneficiary of the contract).  
 6 Additionally, to the extent Elie is found to be Viable's alter ego in this action, the contract  
 7 claims between PartnerWeekly and Viable were resolved in the arbitration, and Elie may  
 8 not re-litigate them. Five Star Capital Corp. v. Ruby, 194 P.3d 709, 713 (Nev. 2008) (en  
 9 banc) (setting forth the elements for claim and issue preclusion). Accordingly, the Court  
 10 will grant PartnerWeekly's Motion to Dismiss Elie's counterclaims for breach of contract  
 11 and breach of the covenant of good faith and fair dealing.

## 12 **B. Fraud**

13 Federal Rule of Civil Procedure 9(b) requires that "[i]n alleging fraud or mistake,  
 14 a party must state with particularity the circumstances constituting fraud or mistake." To  
 15 satisfy this burden, the complaint must state "the who, what, when, where, and how of the  
 16 misconduct charged." Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir.  
 17 2010) (quotation omitted). Additionally, the complaint "must set forth what is false or  
 18 misleading about a statement, and why it is false." Id. (quotation omitted).

19 Elie's Counterclaim does not plead fraud with the requisite particularity. The  
 20 Counterclaim does not identify who made the allegedly false statements, when, or where.  
 21 Additionally, Elie's fraud counterclaim appears to be based on fraud allegedly committed  
 22 against Viable, rather than Elie. The Court therefore will dismiss Elie's fraud counterclaim  
 23 without prejudice to amend to allege fraud with particularity. If Elie chooses to amend, he  
 24 must allege with particularity: (1) that PartnerWeekly made a false representation; (2) that  
 25 PartnerWeekly knew or believed that the representation was false (or had an insufficient  
 26 basis for making the representation); (3) that PartnerWeekly intended to induce Elie to act

or to refrain from acting in reliance upon the misrepresentation; (4) that Elie justifiably relied on the misrepresentation; and (5) damage to Elie resulting from such reliance. Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992). Elie shall have until February 27, 2014 to file an Amended Counterclaim if he believes he can correct the noted deficiencies. Failure to comply with this Order will result in dismissal, with prejudice, of the fraud counterclaim.

### C. Other Parties


The Counterclaim identifies as “counterdefendants” Scott Tucker and Joe Lilly, two individuals who are not plaintiffs in this action. (Ans. & Countercl. at 6.) Although PartnerWeekly pointed out this defect in its Motion, Elie does not respond to support his assertion of counterclaims against individuals who are not plaintiffs. The Court therefore will grant PartnerWeekly’s Motion to Dismiss as it pertains to Scott Tucker and Joe Lilly. See LR 7-2(d).

### III. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff PartnerWeekly, LLC’s Motion to Dismiss Counterclaims (Doc. #78) is hereby GRANTED.

IT IS FURTHER ORDERED that Defendant Chad Elie shall have until February 27, 2014 to file an Amended Counterclaim if he believes he can correct the noted deficiencies. Failure to comply with this Order will result in dismissal, with prejudice, of the fraud counterclaim.

DATED: January 29, 2014



PHILIP M. PRO  
United States District Judge